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BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF )  
A SUBSTANTIAL DEVELOPMENT PERMIT )  
ISSUED BY PIERCE COUNTY TO THE )  
WASHINGTON STATE DEPARTMENT )  
OF HIGHWAYS, )  
WALTER O. BRAGET and MARCELLINE )  
BRAGET, his wife, )  
Appellants, )  
v. )  
PIERCE COUNTY, STATE OF )  
WASHINGTON, DEPARTMENT OF )  
ECOLOGY, DEPARTMENT OF )  
TRANSPORTATION, )  
Respondents. )

SHB No. 79-54

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal from the issuance of a shoreline  
substantial development permit and a conditional use permit issued to  
the Washington State Department of Transportation, came before the  
Shorelines Hearings Board, Nat W. Washington, Chairman, Chris Smith,  
A. M. O'Meara, Robert S. Derrick, David W. Jamison, and David Akana

1 (presiding), at a hearing on February 21, and 22, 1980, in Lacey. The  
2 parties requested to file, and filed, post-hearing briefs.

3 Appellants were represented by their attorney, Hollis H. Barnett;  
4 respondent Department of Transportation (DOT) was represented by  
5 Charles F. Secrest and Ronald Wise, assistant attorneys general;  
6 respondent Department of Ecology (DOE) was represented by Jeffrey D.  
7 Goltz, assistant attorney general; respondent Pierce County was  
8 represented by Keith Black, deputy prosecuting attorney. The issues  
9 presented were limited by a pre-hearing order of this Board.

10 Having heard the testimony, having examined the exhibits, having  
11 read the stipulations of facts and the briefs of counsel and being  
12 fully advised, the Board makes these

#### 13 FINDINGS OF FACT

##### 14 I

15 On January 26, 1979, the respondent State of Washington,  
16 Department of Transportation submitted an application for a shorelines  
17 management substantial development and conditional use permit to  
18 Pierce County for the repair and replacement of the northbound I-5  
19 Nisqually Bridges.

##### 20 II

21 Upon due notice being published, public hearings were held on said  
22 permit application on October 3, 1979, and on November 20, 1979, at  
23 which hearings a number of exhibits and photographs were submitted and  
24 oral testimony taken by the Pierce County Hearing Examiner and the  
25 Pierce County Board of Commissioners, respectively.

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND ORDER

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III

At the conclusion of said hearings, the Pierce County Board of Commissioners granted a substantial development and conditional use permit, subject to certain conditions, based upon the record made at said hearings. The record upon which said permit was based and authority for granting the permit in question are summarized in Pierce County Board of Commissioners' Resolution No. 21855, File No. 399. There were five conditions for approval of this permit. These conditions are as follows:

- A. All debris, overburden and other waste materials from construction shall be disposed of in such a way as to prevent their entry by erosion from drainage into any water body.
- B. The proposed bridge shall be built high enough to allow the passage of debris and anticipated high water flows.
- C. All cut and fill slopes shall be stabilized and planted with native and/or appropriately introduced grasses, shrubs and/or trees which shall be maintained by the Department of Transportation until established.
- D. The applicant shall be responsible to ensure that any contractors working to place the construction of the bridge, do so in such a manner as to cause no damage or injury to Mr. Braget's property.
- E. The bridge shall be constructed in the manner and method presented to the Examiner at the hearing, however, if it can be shown at a later date, that as a result of the construction of the new bridge, the applicant's property is damaged due to this construction, either to his dikes, drains, or otherwise, then the applicant shall be responsible for repair or maintenance of these parts of the shoreline, i.e., Mr. Braget's property to ensure that there are no future damages caused as a result of this new construction.

IV

The permit in question was submitted to the Department of Ecology for approval pursuant to RCW 90.58.140(12) and received by the

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

1 Department of Ecology on December 5, 1979. Upon review of the permit  
2 in question, the Department of Ecology approved the issuance of the  
3 conditional use permit for the construction of the I-5 Nisqually  
4 Bridge on December 21, 1979. The Department of Ecology concurred with  
5 the Pierce County Board of Commissioners that the Nisqually project  
6 meets the intent of the Pierce County Shoreline Master Program in  
7 criteria set forth in WAC 173-14-140 for granting a conditional use.  
8 The actions of the Department of Ecology are reported in a letter from  
9 the Department to the Pierce County Board of Commissioners and to the  
10 Washington State Department of Transportation. The letter is dated  
11 December 21, 1979.

#### 12 V

13 The substantial development and conditional use permit is for the  
14 Department of Transportation's proposal to repair and replace the  
15 existing northbound Nisqually bridges on I-5. The bridges need repair.

16 The permits allow the placement of a 60' transition bridge and a  
17 1530' x 148' embankment fill to replace the existing roadway approach  
18 structure to the Nisqually River Bridge, and the placement of  
19 approximately 118' x 322' of fill and construction of a 400' bridge  
20 (easternmost bridge) to replace an existing 722' bridge and approach  
21 structure. The development is situated within a conservancy  
22 environment designation.

#### 23 VI

24 The existing northbound Nisqually River Bridge and approach  
25 structures were constructed in 1937. The northbound bridge and the  
26 concrete approach structures were paved in 1968 in conjunction with

1 the completion of the construction of the southbound Nisqually River  
2 Bridge.

### 3 VII

4 The hydraulic design of the southbound structures was based in  
5 part on a flood study prepared for the Department of Transportation in  
6 1964 by the United States Geological Survey.

7 The southbound portion of I-5 in the area in question is  
8 constructed, for the most part, on fill. There is an overflow bridge  
9 situated near the location of the proposed 400' bridge. The opening  
10 in the proposed northbound lanes will be as large as the existing  
11 southbound lane opening. Some wetland area is situated between the  
12 north and southbound lanes.

### 13 VIII

14 Mr. and Mrs. Walter Braget own approximately 300 acres of farmland  
15 bordering on the Pierce County banks of the Nisqually River, and  
16 running immediately adjacent to the southbound lanes of I-5 which are  
17 substantially parallel with the northbound lanes of the I-5 repair  
18 project.

19 Appellants use their land for hay production and grazing for  
20 cows. There are several separately diked fields which protect the  
21 lowlands from high tides and river flooding. Duck hunters use various  
22 portions of the site after receiving permission to do so.

23 Appellants are concerned about the channeling of water under the  
24 bridge during floods. After passing under the freeway, it is believed  
25 that the escaping water will cause increased filling of drain tiles  
26 and ditches with sediment as a result of the proposed development.  
27 Appellants are also concerned about damage to their dikes and road

1 systems in the lowland area from an increase in water discharge and  
2 velocity.

3 IX

4 DOT was the lead agency for purposes of compliance with the State  
5 Environmental Policy Act (SEPA), ch. 43.21C RCW. Several months  
6 before submitting its environmental checklist, DOT caused a biological  
7 assessment of a bridge improvement design in the Nisqually flood plain  
8 area to be prepared. The assessment concluded that the fill on the  
9 easternmost portion of the bridge project would remove existing  
10 wetland and thereby have a significant biological impact. The project  
11 was modified to replace the wetland taken with a new wetland area.  
12 With this mitigating measure, the proposed action was submitted on  
13 October 5, 1978. A Declaration of Nonsignificance for the proposed  
14 action was issued on December 18, 1978. No environmental impact  
15 statement was prepared for this proposal.

16 X

17 The proposed development would not create significant additional  
18 flood impact. The elimination of the piling bridge on the northbound  
19 lanes and the installation of an overflow bridge on the easternmost  
20 portion of the project creates no new obstructions to the passage of  
21 flood waters not already existing due to the southbound lanes. The  
22 additional fill will not create an adverse effect with respect to  
23 flooding over existing conditions. In any event, any effect would  
24 occur upstream of the project and not downstream, where appellant's  
25 property is situated. Construction of the project would cause removal  
26 of some natural vegetation. Until revegetated, there may be a slight  
27 velocity increase of the water, which does not now nor would move fast

1 enough to establish a channel. DOT possesses a state flood control  
2 zone permit for its proposed works and structures, which permit was  
3 not appealed.

4 The proposed development was not shown to affect the movement of  
5 groundwater.

#### 6 XI

7 The proposed development would have no substantial or significant  
8 impact on farmlands owned by appellants.

#### 9 XII

10 Section 65.44 of the Pierce County Shoreline Master Program (SMP)  
11 in effect on the date of application (January 26, 1979) was amended  
12 before a decision on the instant development was made by either Pierce  
County or the DOE. Before amendment, provisions therein required  
14 preparation of an environmental impact statement (EIS) and a  
15 conditional use permit before the landfill was placed waterward more  
16 than five feet from the ordinary high water. The amendment, among  
17 other things, deleted the preparation of an EIS as an automatic  
18 requirement of the SMP for such landfills. Respondents can benefit  
19 from the amendments in this case without the resubmission of another  
20 permit application.

#### 21 XIII

22 The SMP in effect at the time of permit issuance and at issue in  
23 the instant matter provides:

24 65.44.010 DEFINITION. Landfill is the creation of  
25 dry upland area by filling or depositing of sand,  
soil or gravel into a wetland area.

26 65.44.020 GENERAL REGULATIONS. The following  
27 regulations apply to all landfill project in all  
shoreline environments:

1 . . . . .  
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3 B. Landfills extending waterward more than five  
4 feet on a horizontal plane from ordinary high  
5 water will be allowed only as a conditional  
6 use, when it can be clearly shown that all the  
7 general regulations herein and the Shoreline  
8 Management Act are satisfied.

9 . . . . .  
10  
11 D. Landfills are prohibited in marshes, bogs and  
12 swamps except in committed industrial areas  
13 having an adopted comprehensive plan and when  
14 there is a demonstrated public benefit as  
15 determined by the County and when no  
16 significant loss of habitat will result. In  
17 other water retention or groundwater recharge  
18 areas, the need for fill in such a site must  
19 be demonstrated by the applicant.

20 . . . . .  
21  
22 65.64.010 DEFINITION. A road is a linear  
23 passageway, usually for motor vehicles, and a  
24 railroad is a surface linear passageway with tracks  
25 for train traffic.

26 65.64.020 GENERAL REGULATIONS. The following  
27 regulations apply to the building of roads and  
28 railroads in all shoreline environments:

29 A. Developers of roads and railroads must be able  
30 to demonstrate the following to the  
31 appropriate reviewing authority:

- 32 . . . . .  
33  
34 2. The construction is designed to protect  
35 the adjacent shorelands against erosion,  
36 uncontrolled or polluting drainage, and  
37 other factors detrimental to the  
38 environment both during and after  
39 construction.  
40  
41 3. That the project will be planned to fit  
42 the existing topography as much as  
43 possible thus minimizing alterations to  
44 the natural environment.

45 . . . . .



8. That efforts have been made to coordinate with existing land use plans including the Shoreline Master Program.

• • • •

D. Roads and railroads shall not be located so as to require large portions of streams to be routed into and through culverts.

• • • •

F. Roads and railroads which must be located in wetland areas shall employ bridge type construction to minimize environmental destruction and to permit a natural movement of groundwater.<sup>1</sup>

G. Major roads and railroads shall cross shoreline areas by the shortest, most direct route feasible, unless such route would cause significant additional environmental damage.

Section 65.64.030D allows roads with a paved surface exceeding thirty feet as a conditional use.

## XIV

The instant development includes a paved road, portions of which will be constructed on landfill in a marsh or swamp associated with the Nisqually River. Approximately 1.5 acres of a 20-25 acre wetland area would be covered with landfill. The covered area will be replaced with a new wetland area.

## XV

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

1. This section was cited for the first time in respondents' closing briefs.

## FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

1 From these Findings the Board comes to these

2 CONCLUSIONS OF LAW

3 I

4 Appellant's request for review was certified by the DOE and  
5 Attorney General on January 16, 1980, and appellants have standing to  
6 bring this appeal.

7 II

8 Respondent DOT has applied for and received a shoreline  
9 substantial development permit and a conditional use permit for its  
10 proposed developments. An appeal from the issuance of such permits  
11 may be brought to this Board pursuant to RCW 90.58.180(1).

12 III

13 Respondent DOT has applied for and received a shoreline  
14 substantial development permit and a conditional use permit for a  
15 "substantial development" as that term is defined in RCW  
16 90.58.030(3)(e). The proposed construction does not fall within the  
17 exemptions of that provision because it is a new development as  
18 compared to the normal maintenance or repair of existing structures or  
19 developments (RCW 90.58.030(3)(e)(1)).

20 IV

21 This Board has jurisdiction over the persons and subject matter of  
22 this appeal.

23 V

24 Section 65.44.020 of the SMP on the dates of the permit decision  
25 and issuance did not require and EIS for the proposed development.

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND ORDER

1 VI

2 WAC 197-10-350 and 355 anticipate that a proposal may be modified  
3 to such an extent that such proposal would not result in a significant  
4 adverse impact upon the quality of the environment. Respondent DOT  
5 modified its proposal early in the planning stages with respect to the  
6 easternmost bridge and fill. Based upon the record established, we  
7 cannot conclude that the declaration of nonsignificance on the  
8 proposal before us was erroneous. The evidence regarding additional  
9 flood impact upon appellants' property clearly is in respondent's  
10 direction and we are not firmly convinced that an error exists.  
11 Accordingly, the preparation of an EIS was not required. We find no  
12 error under SEPA.

13 VII

14 Section 65.64.020(G) of the SMP does not require construction of a  
15 structure substantially similar to the existing structure.

16 VIII

17 Executive Order 80-01 (signed January 4, 1980) requires state  
18 agencies to consider farmland preservation when making decisions and  
19 to give due regard to local government planning, zoning and other  
20 agricultural land protection programs. We believe that the order is  
21 not applicable in this case. Assuming that the order is applicable to  
22 the instant matter, we find no loss of farmland from the proposed  
23 substantial development.

24 IX

25 Appellants' remaining substantive contentions relate to the  
26 alleged inconsistency of the proposed development with the SMP. A

27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

1 permit must be consistent with, inter alia, the master program. RCW  
2 90.58.140(2)(b). Appellants carry the burden of proof in this  
3 appeal. RCW 90.58.140(7)

4 The proposed development is best described as a "road" within the  
5 meaning of the SMP and a road logically includes landfills, bridges  
6 and similar appurtenances. However, regulations applying to  
7 appurtenances may be considered insofar as they may be appropriate to  
8 the overall substantial development proposed. Thus, appellants'  
9 contention that the landfill provision (See Finding of Fact XIII, in  
10 particular, Section 65.44.020D) which prohibits fills in marshes and  
11 swamps does not necessarily control over other provisions relating to  
12 roads.

13 The SMP provisions relating to roads (See Finding of Fact XIII,  
14 Section 65.64.020) are controlling in this case. Appellants did not  
15 establish that the proposed development would be inconsistent with the  
16 cited portions of section 65.64.020A, D or G. However, the road is  
17 located in a wetland area and "shall employ bridge-type construction  
18 to minimize environmental destruction and to permit natural movement  
19 of groundwater." Section 65.64.020F. The project would not affect  
20 groundwater movement. Thus, a full replacement bridge, rather than a  
21 fill and smaller bridge, would be required if there is "environmental  
22 destruction." No unmitigated environmental destruction was shown to  
23 be likely. Therefore, a full replacement bridge is not a reasonable  
24 requirement where a fill and smaller bridge as proposed would not  
25 bring environmental destruction. Accordingly, we find substantial  
26 compliance with section 65.64.020F.

27 FINAL FINDINGS OF FACT AND ORDER

CERTIFICATION OF MAILING

I, Pauline Kerr, certify that I mailed, postage prepaid, copies of the foregoing document on the 22nd day of February, 1980, to each of the following parties at the last known post office addresses with the proper postage affixed to the respective envelopes:

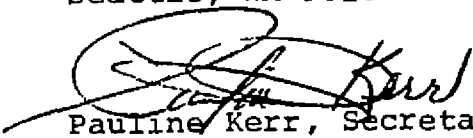
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SHORELINES HEARINGS BOARD